RECORD AND BRIEF



In The
# Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
*Petitioner,*

v.

JACOB LEWIS,
*Respondent.*

ERNST & YOUNG LLP, ET AL.,
*Petitioners,*

v.

STEPHEN MORRIS, ET AL.,
*Respondents.*

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

MURPHY OIL USA, INC., ET AL.,
*Respondents.*

**On Writs Of Certiorari To The United States Courts Of Appeals For The Seventh, Ninth, And Fifth Circuits**

## BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS IN CASE NOS. 16-285 AND 16-300 AND RESPONDENT MURPHY OIL USA, INC. IN CASE NO. 16-307

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* DRI–the Voice of the Defense Bar (DRI) is an international organization that includes more than 22,000 members involved in the defense of civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

This case is of significant interest to DRI because its members routinely represent clients seeking to compel individual arbitration of claims brought under wage-and-hour or other labor laws that are subject to binding arbitration clauses containing class action waivers. Accordingly, DRI's members are familiar with the increasingly common occurrence of the National Labor Relations Board (NLRB), and even

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[1] This brief was authored by *amicus curiae* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. All parties provided written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

some courts, invalidating arbitral class action waivers based on employees' purported federal labor law right to pursue wage-and-hour claims on a collective basis.

This case is the culmination of a sustained campaign by the NLRB and the employment plaintiffs class action bar to nullify this Court's recent precedent by refusing to obey the preemptive mandate of the Federal Arbitration Act (FAA) that arbitration clauses—including arbitral class action waivers—be enforced according to their terms. *See In re D. R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) (originating this effort); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014) (reaffirming *D. R. Horton* ruling); Albina Gasanbekova, *Building a Circuit Split-Updating Moves By the NLRB on Class Waivers*, 34 Alternatives to High Cost Litig. 60, 60 (2016) (the NLRB has issued several dozen decisions nationwide overturning arbitral class action waivers); Eric L. Barnum & Joshua A. Kurtzman, *More Money, More Problems: Class Action Waivers in Mandatory Arbitration Agreements Hit Roadblocks from the NLRB*, Emp. L. Landscape (Feb. 8, 2016), http://goo.gl/P8TXdH (in December 2015 alone, NLRB reportedly issued "well over a dozen decisions striking down class action waivers in arbitration clauses"). Of particular concern to DRI and its members is the NLRB's and some courts' refusal to acknowledge this Court's consistent teaching that the FAA's directive can be overridden only by a contrary congressional command that is expressed in the text of another federal statute in the clearest and most express possible terms. Nothing of the kind exists in the National Labor Relations Act (NLRA).

DRI and its members seek uniform application of the FAA across the nation in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. In particular, class action waivers in employment arbitration agreements allow employers and the civil justice system to avoid the many injustices and disadvantages of the class action mechanism in wage-and-hour litigation. The prospect of a mass proceeding—aggregating thousands or even millions of claims, threatening to produce a crippling liability determination, and possibly imposing a damages award that would annihilate the employer as a going concern—creates a pressure on employer defendants to settle such cases that is virtually irresistible, and a reality that robs the court system of its rightful role in deciding the merits of such claims. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (same); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.").

The decisions of the Seventh Circuit, the Ninth Circuit, and the NLRB in these cases, by invalidating class action waivers in employment arbitration agreements, threaten to revive the evils of the class action device that were thought to have been put to rest in *Concepcion* and *Italian Colors*. This Court should therefore invalidate the NLRB's *D. R. Horton*

rule on which those decisions are based and restore the FAA's role of ensuring that arbitration agreements, including arbitral class action waivers, are enforced according to their terms.

## SUMMARY OF ARGUMENT

Enacted "in response to widespread judicial hostility to arbitration," the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms," including terms setting "'the rules under which that arbitration will be conducted.'" *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013) (citations omitted). Since the FAA's enactment, this judicial hostility has continued to manifest itself through "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements as written. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (citation omitted).

The latest such device is the NLRB's *D. R. Horton* rule—repeatedly reaffirmed by the NLRB and adopted by the Seventh and Ninth Circuits in two of the three cases under review—which interprets the NLRA to confer a substantive right on employees to pursue their wage-and-hour claims on a class or collective basis, and invalidates class action waivers in employment arbitration agreements by narrowing the FAA so that it does not stand in the way. In arbitral class action waivers like those at issue here, plaintiffs agree to: (1) pursue their claims in arbitration, rather than in court; and (2) proceed in arbitration on an individual, bilateral basis, rather than on a class or

collective basis. The *D. R. Horton* rule effectively nullifies this Court's decisions in *Concepcion*, *Italian Colors*, and many other cases that broadly construe the FAA to provide robust protection to such arbitration agreements that require claims to proceed on an individual, bilateral basis in accordance with fundamental attributes of arbitration.

Recognizing the *D. R. Horton* rule's vulnerability under *Concepcion* and its progeny, the NLRB and the Seventh and Ninth Circuits relied on two arguments to shield the rule from attack. First, they claimed the rule fell within the protection of the FAA's saving clause, which preserves from preemption "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). Second, they maintained that employees' right under the NLRA to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157 (2012), amounted to a "'contrary congressional command'" overriding the FAA, *see CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citation omitted). Both of these rationales are fundamentally flawed.

The FAA's saving clause cannot shelter the *D. R. Horton* rule because the rule disfavors arbitration in precisely the manner this Court condemned in *Concepcion*. "Th[e] saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses . . . ,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (citation omitted). That is exactly what the *D. R. Horton* rule does. While the Seventh and Ninth Circuits and the NLRB below

claimed the rule treats arbitration clauses the same as any other contract, this claim is belied by the fact that the *D. R. Horton* rule requires collective proceedings and thereby eviscerates arbitral class action waivers. "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344; *accord Italian Colors*, 133 S. Ct. at 2312 n.5 ("[T]he FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its "'principal purpose'" is the enforcement of arbitration agreements according to their terms.").

Nor can the *D. R. Horton* rule be sustained on the ground that it amounts to a contrary congressional command in the NLRA overriding the FAA. As this Court's cases applying the test make clear, the contrary congressional command claimed to override the FAA's mandate must actually appear in the text of the other federal statute. *See, e.g., Italian Colors*, 133 S. Ct. at 2309-10; *CompuCredit*, 565 U.S. at 100-01, 103-04. The generic reference in section 7 of the NLRA to employees' right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157, simply does not come close to the "clarity" this Court has required of a competing federal statute in order to override the FAA, *CompuCredit*, 565 U.S. at 103. The "concerted activities" provision does not mention arbitration or class actions, and contains no indication that Congress intended section 7 of the NLRA to displace the FAA's mandate.

Accordingly, this Court should disapprove the NLRB's *D. R. Horton* rule and restore the FAA to its rightful place in ensuring that employment arbitration agreements—including arbitral class action waivers—are enforced according to their terms.

## ARGUMENT

### I. THE NLRB'S *D. R. HORTON* RULE RUNS AFOUL OF THE FAA REGARDING THE ENFORCEABILITY OF ARBITRAL CLASS ACTION WAIVERS. THE FAA'S SAVING CLAUSE CANNOT RESCUE IT.

#### A. The FAA requires that arbitral class action waivers be enforced according to their terms.

The FAA was enacted "in response to widespread judicial hostility to arbitration." *Italian Colors*, 133 S. Ct. at 2308-09. It embodies "a 'liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (citation omitted).

The FAA's core provision mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, the FAA requires that "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Concepcion*, 563 U.S. at 339 (citations omitted). "The final phrase of § 2," known as the

"saving clause[,] permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (citations omitted).

As part of this directive, the FAA "mandates enforcement of agreements to arbitrate statutory claims." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Thus, more than a quarter of a century ago, this Court held that the FAA requires employees to arbitrate statutory wage claims. *Perry v. Thomas*, 482 U.S. 483, 486-93 (1987); *accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

The FAA's mandate applies to claims arising under federal statutes, and that mandate can only "be overridden by a contrary congressional command. The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 226-27 (citations omitted).

### B. The NLRA protects employees' right to engage in concerted activities for mutual aid or protection but says nothing about class actions or arbitration.

Section 7 of the NLRA provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

> through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157. The NLRA declares it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" section 7. 29 U.S.C. § 158(a)(1) (2012). These provisions say nothing about arbitration or class actions.

In 2012, for the first time, the NLRB interpreted these NLRA provisions to confer on employees a substantive federal right to pursue employment claims—including statutory wage claims—in court on a class or collective basis and to invalidate arbitral class action waivers as an unfair labor practice. *D. R. Horton*, 357 N.L.R.B. at 2277-82; *see also Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *1-2, *5-11 (reaffirming *D. R. Horton* rationale).

### C. The FAA's saving clause does not preserve the *D. R. Horton* rule's invalidation of arbitral class action waivers.

Since issuing *D. R. Horton*, the NLRB—now joined by the Seventh and Ninth Circuits—has repeatedly adhered to its determination that the NLRA entitles plaintiffs to pursue their wage-and-hour claims on a class or collective basis. *See* Epic Systems' (Epic) Pet. App. 1a-2a; Ernst & Young's (E&Y) Pet. App. 1a; NLRB Pet. App. 17a-23a; Gasanbekova, *supra*, at 60. However, this Court held in *Concepcion* that class

proceedings "interfere[ ] with fundamental attributes of arbitration and thus create[ ] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344; *see id.* at 348. The Court subsequently reaffirmed this holding, stressing that class proceedings contravene the FAA by "'sacrific[ing] the principal advantage of arbitration—its informality—and mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment.'" *Italian Colors*, 133 S. Ct. at 2312 (citation omitted). The NLRB has thus attempted to deny precisely what the FAA protects—the enforceability of class action waivers in arbitration agreements.

Although this Court has repeatedly held that the proper way to reconcile any potential conflict between the FAA and another federal statute is the contrary congressional command test, *see infra*, pp. 13-21, the Seventh and Ninth Circuits and the NLRB instead attempted to reconcile this conflict by relying on the FAA's saving clause. They maintained that the *D. R. Horton* rule does not target arbitration and would apply equally in litigation or any other dispute resolution forum, such that the rule puts arbitration agreements on an equal footing with all other contracts. Epic Pet. App. 15a-17a; E&Y Pet. App. 12a-14a, 20a-23a; NLRB Pet. App. 34a-35a, 44a-45a.

Putting aside the fact that the Seventh and Ninth Circuits improperly ignored the contrary congressional command test, *see infra*, pp. 13, 22-25, their application of the FAA's saving clause is fundamentally flawed. This Court specifically rejected their reasoning in *Concepcion*, using as an example a rule barring enforcement of arbitral restrictions on

discovery as against public policy. *Concepcion*, 563 U.S. at 341-42. Even if such a rule were labeled a general rule equally applicable to all contracts, including those outside the arbitral context, this Court firmly declared that "[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* at 342. *Concepcion* thus condemned this mode of analysis as manifesting "the judicial hostility towards arbitration that prompted the FAA [which] had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Id.* (citation omitted); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (holding FAA invalidates any "rule discriminating on its face against arbitration" and "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements").

The central fallacy of the Seventh and Ninth Circuits' and the NLRB's reasoning is their unsupported assumption—directly forbidden by *Concepcion* and its progeny—that an arbitral class action waiver is not integral to the arbitration agreement of which it forms a part. *See* Epic Pet. App. 12a; E&Y Pet. App. 13a-14a, 22a-23a; NLRB Pet. App. 43a-45a; *see also* NLRB Pet. App. 181a-182a (Johnson, Member, dissenting). As this Court has explained, bilateral proceedings are a fundamental attribute of arbitration protected by the FAA, and attempts to force parties to proceed on a class or collective basis in contravention of a binding arbitral class action waiver

are forbidden. *See Concepcion*, 563 U.S. at 344, 348; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683-84 (2010) (holding that "parties may specify *with whom* they choose to arbitrate their disputes," and "[i]t falls to courts and arbitrators to give effect to these contractual limitations" in order "to give effect to the intent of the parties"); *Italian Colors*, 133 S. Ct. at 2312 n.5 ("[T]he FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its '"principal purpose"' is the enforcement of arbitration agreements according to their terms.").

Thus, when some other law mandates collective proceedings (even as a general rule), that law—when applied to an arbitral class action waiver—"derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue," "interferes with fundamental attributes of arbitration[,] and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 339, 344.

The FAA's saving clause cannot justify the *D. R. Horton* rule because "a federal statute's saving clause '"cannot in reason be construed as [allowing] a . . . right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."'" *Concepcion*, 563 U.S. at 343 (citations omitted). Thus, the *D. R. Horton* rule is squarely irreconcilable with the FAA.

## II. THE *D. R. HORTON* RULE SHOULD BE OVERTURNED BECAUSE THE NLRA'S TEXT DOES NOT CONTAIN A CONTRARY CONGRESSIONAL COMMAND OVERRIDING THE FAA'S MANDATE THAT ARBITRAL CLASS ACTION WAIVERS BE ENFORCED ACCORDING TO THEIR TERMS.

By invoking the FAA's saving clause to justify the *D. R. Horton* rule's invalidation of class action waivers in employment arbitration agreements, the Seventh and Ninth Circuits avoided having to confront the dispositive question in these cases: whether anything in the text of the NLRA overrides the FAA's mandate that arbitral class action waivers must be enforced according to their terms. This Court has many times addressed whether another federal statute contains a contrary congressional command overriding the FAA, and has formulated a clear statement rule governing these cases: unless the text of the other federal statute clearly evinces Congress's intent to override the FAA, the FAA's mandate prevails and requires that the arbitration agreement be enforced. *See Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 100-01, 103-04.

### A. In any claimed conflict between the FAA and another federal statute, the FAA governs unless the other statute embodies a contrary congressional command overriding the FAA's mandate.

The FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms, . . . including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes,' . . . and 'the rules under which that arbitration will be conducted.'" *Italian Colors*, 133 S. Ct. at 2309 (citations omitted); *see also CompuCredit*, 565 U.S. at 98. "That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been '"overridden by a contrary congressional command."'" *Italian Colors*, 133 S. Ct. at 2309 (citations omitted).

While this Court has utilized various methods over the years to analyze whether a contrary congressional command can be found in another federal statute, its modern precedent has never actually reached that conclusion in the numerous times it has addressed this issue. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *McMahon*, 482 U.S. 220; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Gilmer*, 500 U.S. 20; *CompuCredit*, 565 U.S. 95; *Italian Colors*, 133 S. Ct. 2304.[2]

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[2] *Wilko v. Swan* did invalidate an arbitration clause on the ground that it fell afoul of the Securities Act of 1933. 346 U.S. 427, 438 (1953). However, this Court overruled *Wilko* in *Rodriguez de Quijas* because it concluded that the Securities Act (continued...)

## B. This Court's decisions have evolved from considering text, legislative history, and statutory purpose to an exclusive focus on statutory text in applying the contrary congressional command test.

### 1. The contrary congressional command test originated as a method to reconcile the FAA with potentially conflicting federal statutes.

This Court confronted and began to develop its approach to the issue of how to reconcile the FAA and a potentially conflicting federal statute in *Mitsubishi Motors*, which involved federal antitrust claims that the parties had agreed to arbitrate. *Mitsubishi Motors*, 473 U.S. at 616-20. This Court held that agreements to arbitrate federal statutory claims must be enforced under the FAA "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 628. The Court explained that "if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible *from text or legislative history*." *Id.* (emphasis added).

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of 1933 does not contain a contrary congressional command overriding the FAA. 490 U.S. at 480-85.

*McMahon* presented the next opportunity for this Court to address this issue. That case involved claims by investors against a brokerage under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations (RICO) Act, which the parties had agreed to arbitrate. *McMahon*, 482 U.S. at 222-23. This Court reaffirmed that the FAA "mandates enforcement of agreements to arbitrate statutory claims." *Id.* at 226. However, it clarified that, "[l]ike any statutory directive," the FAA "may be overridden by a contrary congressional command." *Id.* The Court explained that, "[i]f Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history or from an inherent conflict between arbitration and . . . the statute's underlying purposes." *Id.* at 227 (citations omitted). The Court also placed "[t]he burden . . . on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* After finding no indication in the text or legislative history of the Securities Exchange Act of 1934 or the RICO Act that Congress intended to preclude arbitration of such claims, this Court concluded that nothing in the purposes behind those statutes conflicted with the FAA's mandate. *See also Rodriguez de Quijas*, 490 U.S. at 481-84 (applying same analysis to hold that the Securities Act of 1933 does not override FAA's mandate).

### 2. This Court has more recently shifted its focus from statutory purpose to statutory text in applying the contrary congressional command test.

This Court refined the contrary congressional command test in *Gilmer*, which involved the enforceability of an agreement to arbitrate an Age Discrimination in Employment Act (ADEA) claim. *Gilmer*, 500 U.S. at 23-24. *Gilmer* held that the ADEA did not contain a contrary congressional command overriding the FAA because "Congress . . . did not *explicitly* preclude arbitration or other nonjudicial resolution of claims" in the ADEA. *Id.* at 29 (emphasis added). While this Court also examined whether there was an inherent conflict between the purposes of the ADEA and the FAA, 500 U.S. at 26-27, its analysis marks the beginning of a shift away from consideration of inherent conflict between perceived statutory purposes and towards an exclusive focus on statutory text.

Of particular importance here, *Gilmer* rejected the plaintiff's argument that because the ADEA provided for class proceedings, enforcing a bilateral arbitration clause would not achieve the ADEA's purposes. *Gilmer* explained that "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* at 32 (citation omitted). Furthermore, *Gilmer* clarified that "[m]ere inequality in bargaining

power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 33.

The Court reinforced its increasing focus on statutory text in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251-53 (2009), which involved a collective bargaining agreement that included an agreement to arbitrate an ADEA claim. In enforcing this arbitration clause, the Court disagreed with Justice Stevens' dissenting view that the arbitration clause should not be enforced because the ADEA's purposes conflicted with arbitration:

> The *Gilmer* Court did not adopt Justice STEVENS' personal view of the purposes underlying the ADEA, for good reason: That view is not embodied within the statute's text. Accordingly, it is not the statutory text that Justice STEVENS has sought to vindicate—it is instead his own "preference" for mandatory judicial review, which he disguises as a search for congressional purpose. This Court is not empowered to incorporate such a preference into the text of a federal statute.

*Id.* at 267 n.9; *see also id.* at 270 ("We cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text. Absent a constitutional barrier, 'it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.'" (citation omitted)).

### 3. This Court has explicitly and exclusively focused on statutory text in its most recent cases applying the contrary congressional command test.

In *CompuCredit*, this Court made explicit what it had been signaling ever since *Mitsubishi Motors*: that the contrary congressional command test looks only to the other federal statute's text. *CompuCredit* involved claims under the Credit Repair Organizations Act (CROA), which the plaintiffs had agreed to arbitrate. *CompuCredit*, 565 U.S. at 96-97. The plaintiffs argued that several of the CROA's provisions constituted a contrary congressional command overriding the FAA's mandate. *Id.* at 98-100. Without mentioning the CROA's underlying purposes or its legislative history, this Court looked solely at the CROA's text for a contrary congressional command and rejected the plaintiffs' arguments, concluding: "If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, . . . valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law." *Id.* at 100-01 (citation omitted).

Notably, *CompuCredit* provided the following examples of contrary congressional commands sufficient to override the FAA's mandate. *Id.* at 103-04. These examples show the specificity with which a contrary congressional command must appear in statutory text to override the FAA:

- 7 U.S.C. § 26(n)(2) (2012): "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."

- 15 U.S.C. §1226(a)(2) (2012): "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."

- 12 U.S.C. § 5518(b) (2012): "The [Consumer Financial Protection] Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."

In citing these examples, *CompuCredit* emphasized that, "[w]hen [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." *CompuCredit*, 565 U.S. at 103.

Most recently, this Court reaffirmed *CompuCredit*'s textual approach in *Italian Colors*, in which the plaintiffs argued that the federal antitrust laws amounted to a contrary congressional command overriding the FAA's mandate requiring the enforcement of plaintiffs' arbitral class action waiver. *Italian Colors*, 133 S. Ct. at 2308. Without examining statutory purpose or legislative history, the Court held that "[n]o contrary congressional command requires us to reject the waiver of class arbitration here" because "[t]he antitrust laws do not 'evinc[e] an intention to preclude a waiver' of class-action procedure" since "[t]he Sherman and Clayton Acts *make no mention* of class actions." *Id.* at 2309 (emphasis added).

This Court has followed the same path away from consideration of statutory purpose and toward exclusive focus on statutory text in other cases calling for interpretation of federal statutes or resolution of statutory conflict. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286-88 (2001) (looking solely to statutory text to hold that private right of action could not be implied under Title VI of 1964 Civil Rights Act to sue for disparate impact, and condemning earlier cases that gave weight to congressional purpose in implied private right of action analysis); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 402-05 (2010) (condemning resort to legislative history and examining only statutory text in determining whether state statute conflicted with Federal Rule of Civil Procedure for *Erie* purposes).

### C. Nothing in the NLRA's text contains a contrary congressional command overriding the FAA with the clarity this Court's cases require.

Applying this Court's strict textual approach here, the NLRA does not contain any language even approaching the clarity required of a contrary congressional command that could override the FAA.

The Seventh and Ninth Circuits and the NLRB below pointed to sections 7 and 8(a)(1) of the NLRA, 29 U.S.C. §§ 157, 158(a)(1), as creating a substantive right for employees to pursue wage-and-hour claims on a class or collective basis. Epic Pet. App. 3a-9a; E&Y Pet. App. 3a-11a; NLRB Pet. App. 17a-20a, 31a-33a, 38a-43a. But those provisions do not specifically mention arbitration, as required to constitute a contrary congressional command overriding the FAA's directive to enforce arbitration agreements according to their terms, including their arbitral class action waivers. *See Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 103-04. Section 7 merely protects employees' right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, while section 8(a)(1) prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in" section 7, 29 U.S.C. § 158(a)(1).

This does not even come close to the level of specificity and clarity embodied in the statutes this Court pointed to in *CompuCredit*, 565 U.S. at 103-04, as sufficient for a contrary congressional command overriding the FAA. Indeed, both the CROA and the ADEA, at issue respectively in *CompuCredit*, *id.* at 107, and *Gilmer*, 500 U.S. at 32, specifically provided for class actions, but this Court did not hesitate to hold that these specific textual references to class proceedings were insufficient to displace the FAA's mandate. *See Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, . . . we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions. We said that statutory permission did '"not mean that individual attempts at conciliation were intended to be barred."'" (citations omitted)).

Nor does the NLRA's legislative history change this analysis. While *McMahon* referenced legislative history as a possible source for a contrary congressional command, *McMahon*, 482 U.S. at 227, this Court's exclusive focus on statutory text since *McMahon* demonstrates that mere legislative history unaccompanied by anything in the text of a statute is not a sufficient ground on which to base a contrary congressional command overriding the FAA, *see Italian Colors*, 133 S. Ct. 2309-10; *CompuCredit*, 565 U.S. at 103-04; *Pyett*, 556 U.S. at 267 n.9.

This development away from legislative history makes sense. In recent years, this Court has highlighted the frequent unreliability of legislative history as a guide to congressional intent. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *see also Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176-77 (2014) (Scalia, J., concurring in principal part and concurring in the judgment) (laying out several flaws in the reliance on legislative history to interpret statutes).

In any case, nothing in the legislative history of sections 7 and 8(a)(1) of the NLRA even hints that Congress intended those provisions to override the FAA's mandate that arbitration agreements—including arbitral class action waivers—be enforced according to their terms. This is not surprising. Like the antitrust laws examined in *Italian Colors*, the NLRA was

> enacted . . . before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." The parties here agreed to arbitrate pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

*Italian Colors*, 133 S. Ct. at 2309 (citation omitted); *accord D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361

(5th Cir. 2013) ("Congress did not discuss the right to file class or consolidated claims against employers," such that "the legislative history [of the NLRA] . . . does not provide a basis for a congressional command to override the FAA"); E&Y Pet. App. 37a (Ikuta, J., dissenting) ("The NLRA was enacted decades before Rule 23 created the modern class action in 1966.").

In short, nothing in the NLRA's text nor in its (irrelevant) legislative history amounts to a contrary congressional command overriding the FAA's mandate that the arbitral class action waivers here be enforced according to their terms.

## CONCLUSION

For the foregoing reasons and for the reasons stated in Epic Systems', Ernst & Young's, and Murphy Oil USA's briefs on the merits, this Court should reverse the Seventh and Ninth Circuits' decisions in *Epic Systems* and *Ernst & Young*, affirm the Fifth Circuit's decision refusing to enforce the NLRB's ruling in *Murphy Oil*, and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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